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No. 06-116

IN THE

Supreme Court of the United States

DOUGLAS B. MOYLAN, ATTORNEY GENERAL OF GUAM
Petitioner,

v.

FELIX P. CAMACHO, GOVERNOR OF GUAM
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GUAM

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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This case presents an important question of federal law concerning a congressionally established limit on the basic powers of a territorial government. The Guam Supreme Court decided the question incorrectly, ignoring the wording and undisputed purposes of the Guam Organic Act's debt-limitation proviso. The result is to give the Guam government more authority to incur indebtedness than Congress intended and thus to permit the Guam government to imperil the territory's fiscal health.

The Court of Appeals recognized the question's importance by granting certiorari. This Court should do so too. Absent intervention by this Court, this issue affecting the governance of more than 150,000 U.S. citizens will go unreviewed by any Article III court.

I. THIS COURT HAS JURISDICTION

Respondent rightly acknowledges that this dispute presents a case or controversy under Article III. Br. in Opp. 3 n.1. But he contends that the Court nonetheless lacks jurisdiction because the petition was untimely. That contention is meritless.

As the petition explains, this Court has recognized that although the 90-day period for filing certiorari petitions is jurisdictional, the period only begins to run once there is a judgment below in the relevant sense. Pet. 2-3. The Court has repeatedly held that when a litigant or court below takes an action that "raise[s] the question whether the court will modify the judgment and alter the parties' rights," *Hibbs* v. *Winn*, 542 U.S. 88, 98 (2004), there simply "is no 'judgment' to be reviewed," *Missouri* v. *Jenkins*, 495 U.S. 33, 46 (1990), within the meaning of the statute setting the 90-day time limit. That is precisely the case here, where the Court of Appeals' proper grant of certiorari served to suspend the effect of the Guam Supreme Court's decision and leave the parties' rights subject to alteration until the Court of Appeals ruled that a statute enacted in the interim had deprived it of jurisdiction. It was only once the Court of Ap-

peals had held that it lacked jurisdiction that there was a final judgment below to be reviewed by this Court.

Respondent points out that this Court has never applied the principle described in cases such as *Hibbs* and *Jenkins* to the precise circumstances presented in this case. Br. in Opp. 2. That is hardly surprising, given how unusual those circumstances are: a decision by a territorial supreme court properly accepted for certiorari review by a Court of Appeals, only to have Congress shift certiorari jurisdiction to this Court after the case had been fully briefed and argued in the Court of Appeals. Respondent suggests that petitioner should have filed a certiorari petition with this Court while the Court of Appeals was still considering the case, Br. in Opp. 1, despite the fact that the Court of Appeals had already granted certiorari and had yet to decide whether the intervening statute deprived it of jurisdiction. The jurisdiction-shifting statute was passed much more than 90 days after the Guam Supreme Court's decision, and respondent would no doubt have opposed such a petition as untimely even if petitioner had filed it. In any event, a rule requiring such a filing would only have encouraged wasting this Court's judicial resources by requiring it to consider a premature petition and possibly would have delayed the Court of Appeals' resolution of the question whether the jurisdiction-shifting statute applied to this pending appeal. Respondent also suggests that petitioner should have filed a motion with the Guam Supreme Court seeking to have it retain jurisdiction of the case, *id.* at 2, but respondent fails to explain how that would have been proper once the Court of Appeals had assumed jurisdiction over the appeal.

In short, respondent offers no principled basis for denying the applicability of the rule of *Hibbs* and *Jenkins* to the admittedly idiosyncratic circumstances of this petition. Petitioner has at every turn sought review of the Guam Supreme Court's decision in a timely manner, first by petitioning the Court of Appeals successfully and then by filing this petition promptly once it was clear that jurisdiction lay in this Court

rather than the Court of Appeals. Neither 28 U.S.C. § 2101(c) nor common sense requires anything more.

II. This Court Need Not Defer To A Territorial Court About The Question Presented, Which Is One Of Federal Law

Respondent argues that this case presents a question of purely local concern to the territory of Guam, and that this Court should thus defer to the Guam Supreme Court's interpretation of Section 11 of the territory's Organic Act. Br. in Opp. 9-13. The question at issue, however, is one of federal, not territorial, law. Both this Court and the Court of Appeals during its tenure as the Article III court reviewing the Guam Supreme Court's rulings, have made clear that Article III courts owe deference to territorial courts' interpretations of local law, not federal law. And while resolution of the question presented may have only indirect significance outside Guam, that hardly demonstrates that the question is beneath this Court's attention. The issues this Court accepts for review from the territorial courts are often of limited significance outside the territory from which the issue arises. The question here involves the meaning of an Act of Congress that defines one of the basic powers of a government under which more than 150,000 U.S. citizens live. It is thus a question of sufficient public importance to warrant this Court's scrutiny.

Respondent cites several cases to support his claim that this Court has consistently granted deference to the decisions of territorial courts addressing questions of local concern. Br. in Opp. 10. Those cases, unlike this one, however, involved a territorial court's interpretation of territorial, not federal, law. *See Waialua Agric. Co.* v. *Christian*, 305 U.S. 91, 109 (1938) (territorial court's interpretation of Hawaiian law concerning the validity of actions taken by an incompetent to convey or assign property rights); *Matos* v. *Hermanos*, 300 U.S. 429, 432 (1937) (territorial supreme court's interpretation of territorial law mandating whether a sales contract was voidable rather than void); *Santa Fe Cent. Ry. Co.* v. *Friday*, 232 U.S. 694, 700 (1914) (territorial court's

interpretation of territorial statutes defining jurisdiction of local courts). This Court has expressly recognized the distinction between decisions of territorial courts interpreting local law and decisions interpreting federal law, explaining that "great deference must be paid to local decisions ... *[w]here the Constitution or statutes of the United States [are] not involved.*" *De Castro* v. *Board of Comm'rs*, 322 U.S. 451, 457-458 (1944) (emphasis added). When, as here, a federal question is presented, no such deference is called for.

Contrary to respondent's contention, Br. in Opp. 11, the Courts of Appeals, when endowed with certiorari jurisdiction over decisions of territorial supreme courts, have followed the same policy of deference to interpretations of local law, but not of federal law. The Court of Appeals for the Ninth Circuit, for example, in reviewing decisions of the Guam Supreme Court, gave deference to rulings addressing Guam law, but not to ones addressing federal law. The latter were reviewed *de novo*. *See, e.g.*, *Gutierrez* v. *Pangelinan*, 276 F.3d 539, 546 (9th Cir. 2002).[1] This Court owes the Guam Supreme Court's reading of the federal Organic Act no special consideration.

Respondent argues that the meaning of Section 11 of the Guam Organic Act does not merit this Court's attention because it is an issue of concern only to Guam. As explained in the petition, a decision by this Court undoing the Guam Supreme Court's erroneously permissive interpretation of Guam's federal debt-limitation provision might well have indirect effects on the fiscal policies adopted in other territo-

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[1] Consistent with that approach, the one First Circuit decision cited by respondent as supporting the principle of deference to territorial courts' interpretations, *Campose* v. *Central Cambalache, Inc.*, 157 F.2d 43 (1st Cir. 1946), involved issues of Puerto Rican, not federal, law. *See id.* at 44.

Pernell v. *Southall Realty*, 416 U.S. 363 (1974), upon which respondent also relies, Br. in Opp. 11-12, addressed the deference due particularly to the courts of the District of Columbia, and it has never been cited as supporting deference to the decisions of the courts of non-incorporated territories such as Guam.

ries. Pet. 21-23.[2] But while the question presented has direct significance only for Guam, that is no reason for this Court to deem it unworthy of review. On the contrary, the decisions arising from territories that this Court has chosen to review have often concerned issues that were of direct moment only to the territory in question. *See, e.g., Territory of Alaska* v. *American Can Co.*, 358 U.S. 224, 225 (1959) (petition "granted in view of the fiscal importance of the question to [the territory of] Alaska"); *Puerto Rico* v. *Rubert Hermanos, Inc.*, 309 U.S. 543, 544 (1940) ("The question here in controversy is a matter of great importance to Puerto Rico and involves the power of its legislature to enforce Congressional policies affecting the Island. We therefore brought the case here on a writ of certiorari ...."). Indeed, respondent cites several decisions by this Court that, by respondent's own account, addressed issues of purely local concern to territorial governments and their inhabitants. Br. in Opp. 10. Yet this Court chose to review those issues nonetheless. And it did so even though, as noted above, *supra* pp. 3-4, the issues were ones of local, rather than federal, law.[3] This Court chose to review those territory-specific questions no doubt because the questions presented were ones of great significance to the governments and peoples of the territories involved. The same is certainly true here, where the issue concerns a fundamental, congressionally

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[2] As respondent points out, Br. in Opp. 23, Puerto Rico's debt ceiling is contained in its constitution rather than in a federal organic act. But that does not weaken the point that Puerto Rico, like Guam and the Virgin Islands, has experienced recurrent fiscal crises and that a decision by this Court interpreting the Guam debt-limitation proviso in light of the goals of fiscal restraint and governmental accountability that underlie all three territories' debt caps might well have a beneficial effect on both interpretations of and fiscal policy carried out under the debt caps in Guam's sister territories.

[3] Once one adds in decisions by this Court addressing questions of federal law of peculiar interest to particular territories, the list of decisions by territorial courts addressing issues of direct significance only to particular territories that this Court has accepted for review grows even longer. *See, e.g., Territory of Guam* v. *Olsen*, 431 U.S. 195 (1977).

mandated limitation on one of the Guam territorial government's core powers.

III. The Guam Supreme Court's Decision Ignores The Plain Terms And Purposes Of The Organic Act's Debt-Limitation Provision

As the petition demonstrates, the Guam Supreme Court plainly misinterpreted the debt-limitation provision in Section 11 of the Organic Act. The provision's wording and central purposes show that the phrase "aggregate tax valuation" refers to the assessed value of property in Guam used for imposing property taxes rather than the full market value. Respondent repeats the arguments offered by the Guam Supreme Court for the contrary view, but offers no remedies for the flaws from which those arguments suffer.

If Congress had intended to set the debt ceiling with reference to the full value of all property on Guam, it could simply have said "aggregate valuation." Instead, it included the qualifier "tax," with the evident purpose of tying the level of permissible indebtedness to the valuation of property used for purposes of taxation, that is, the assessed value. Respondent, like the Guam Supreme Court, offers no plausible response to this fundamental point.

Board of Education v. *Passey*, 246 P.2d 1078 (Utah 1952), and the decisions upon which it relied, made this very point in interpreting state constitutional debt caps that lacked a qualifying term such as "tax" or "assessed." Pet 15-16. The absence of a qualifier, these decisions reasoned, showed that full, not assessed, value was intended as the measure of the cap. Respondent suggests that *Passey* and the other decisions turned on another phrase in the debt-limitation provisions at issue, Br. in Opp. 21-22, but even a cursory examination shows respondent mischaracterizes those decisions. The question in *Passey* was whether a state statute authorizing school districts to incur indebtedness up to four percent "of one hundred percent of the reasonable fair cash value of the taxable property therein," 246 P.2d at 1079, was consistent with a constitutional limitation of indebtedness to four percent of "the value of the taxable prop-

erty therein, *the value therein to be ascertained by the last assessment for State and County purposes, previous to the incurring of the indebtedness*," *id.* at 1078 (emphasis added), where the state legislature had set the assessment rate at 40%. Respondent stresses the italicized clause in the constitutional debt cap. But it was precisely the reference to assessment in that clause that the defendant pointed to in supporting his argument that the constitutional cap was defined in terms of the assessed value of property, *i.e.*, 40%, not 100%. Despite that reference to assessment, the Utah Supreme Court emphasized that the constitutional limit must mean full, not assessed, value exactly because the "word 'value' is not limited or qualified by any adjectives." *Id.* at 1079. The similar decisions from Washington and Iowa followed the same path of reasoning. Thus, the presence of the clause emphasized by respondent only drives home how decisive these courts took the absence of a qualifier before "value" or "valuation" to be. It is the presence of such a qualifier here, "tax," that respondent, like the Guam Supreme Court, is unable to explain.

Echoing the Guam Supreme Court, respondent suggests that the word "tax" serves to limit the property whose valuation determines the debt ceiling to taxable property. Br. in Opp. 15. If Congress had intended the word "tax" (or one of its variants) to specify the type of property included in the debt calculation, though, it would have placed the modifier "taxable" before the word "property," not "tax" before "valuation." *See* Pet. 16. The Congress that enacted the Guam Organic Act was certainly familiar with designating the universe of property used to calculate a debt cap by placing "taxable" in front of "property." In crafting the debt-limitation provision in the Virgin Islands Organic Act only months earlier, Congress limited that territory's indebtedness based upon the "aggregate assessed valuation of the *taxable real property*." 48 U.S.C. § 1403 (emphasis added). Thus, if Congress had wanted the word "tax" in Guam's debt-limitation provision to serve the purpose of specifying the type of property encompassed in the debt limitation calculation, Congress could have elected to use a qualifier to

modify the term "property" instead of the term "valuation." Instead, Congress included the qualifier "tax" before "valuation," thereby tying the level of permissible indebtedness to the valuation of property used for the purpose of taxation, *i.e.*, the assessed value.

Respondent contends that petitioner's reading improperly derives the meaning of the phrase "aggregate tax valuation" in the federal Organic Act from the definition given the term "value" in the Guam statute that sets the assessment rate at 35% by defining "value" to mean 35% of market value. Br. in Opp. 13-14, 21-22; *see* 11 Guam Code Ann. § 24102(f). Respondent attributes to petitioner an argument he does not make. The Guam legislature clearly does not have the authority to define terms contained in the federal Organic Act, and petitioner has not claimed that the meaning of the phrase "aggregate tax valuation" turns upon the definition of the word "value" adopted by the Guam legislature. The Guam legislature need not have used the word "value" or any of its variants in setting the assessment rate for property on Guam, and petitioner's argument would be wholly unaffected if it had not. It is the text and purposes of the Organic Act that make clear that the phrase "aggregate tax valuation" means assessed value because of the relationship between assessed value and taxing capacity. The presence of the word "value" in the Guam statute setting the particular rate of assessment is wholly beside the point.

The link between the Guam Organic Act's debt-limitation provision and valuation of property for purposes of taxation is drawn not only by the presence of the word "tax" immediately before the word "valuation," but also by the introductory phrase allowing borrowing only "when necessary to anticipate taxes and revenues." 48 U.S.C. § 1423a. That phrase emphasizes that borrowing by the Guam Legislature is permissible only when the Legislature determines that the debt incurred can be paid off from existing or reasonably anticipatable sources of tax revenue.

Respondent's interpretation leaves the territorial Legislature free to engage in much greater borrowing—with the

present assessment rate of 35%, nearly three times as much borrowing—as would the interpretation urged by petitioner. Respondent notes that the Guam Legislature could raise the borrowing limit without changing the actual property tax burden by increasing the assessment rate but lowering the tax rate. Br. in Opp. 16-17. While that is mathematically correct, it ignores the political psychology that leads jurisdictions all around the United States to keep assessment rates lower than full appraised value. That widespread practice, no doubt familiar to members of Congress, reflects voters' preference for assessment rates of less than 100%, perhaps because voters are both skeptical of the willingness of legislatures to lower tax rates as property values increase and sensitive to the risk that rising property values may lead to unrealized gains yet current-year tax burdens.

Respondent, like the Guam Supreme Court, stresses the difference in the wording of the Virgin Islands and Guam Organic Acts. Br. in Opp. 17-20. But, as the petition explains, the use of the word "assessed" in the Virgin Islands statute was necessary because the Virgin Islands statute already included a requirement that "all taxes on real property in the Virgin Islands shall be computed on the basis of the actual value of such property," 48 U.S.C. § 1401a. Pet. 17-19. Because of this pre-existing federal requirement, if the debt-limitation provision added to the Virgin Islands Act in 1949 had defined the limitation with reference to "aggregate tax valuation," that might well have been understood to mean actual value. Thus, in the Virgin Islands Act, it was necessary for Congress to insert the word "assessed" before "valuation" in the debt-limitation proviso in order to make clear that the debt ceiling was tied to the assessed value of property, not its full, appraised value.

Respondent observes that Congress imposed the requirement of full-value taxation in the Virgin Islands Act in order to remove certain inequalities in taxation that had existed in the Virgin Islands before that. Petitioner noted this very point in the petition. *See* Pet. 18 n.2. The reason for the requirement is not disputed, nor is it relevant. What

matters for purposes of understanding the wording of the Virgin Islands' debt-limitation provision, which was added to the Virgin Islands Organic Act in 1949, is that the full-valuation requirement had been put in place 13 years earlier and thus was an existing element of the Organic Act that a new provision, such as the debt cap, had to take into account. It was because of the full-valuation requirement's presence that the word "assessed" was needed before "valuation" in the Virgin Islands Act. There was no similar need in the Guam Organic Act, the debt-limitation proviso of which was enacted as part of the original Organic Act in 1950.

The purpose of Guam's federal debt-limitation provision is "to benefit the taxpayer by restraining the government's propensity to incur debts and to saddle future generations of taxpayers with those debts." *Guam Tel. Auth.* v. *Rivera*, 416 F. Supp. 283, 287 (D. Guam 1976). The Guam Supreme Court's decision undermines that fundamental congressional goal. This case thus presents an important opportunity for this Court to ensure that the limitations Congress has imposed on a territorial government are properly understood and scrupulously observed. Doing so will promote both the fiscal soundness of Guam's government and the accountability of that government to the U.S. citizens it serves.

CONCLUSION

For the reasons given above as well as those given in the petition, the petition should be granted.

Respectfully submitted,

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